Supreme Court U.S.
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2005

ROBERT D. PALADINO,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether this Court's opinion in *Luce v. United States*, 469 U.S. 38, 105 S.Ct. 460 (1984) warrants a general principle of appellate review that a defendant may not obtain "two bites at the apple," thereby requiring defendants to cease their efforts at obtaining an acquittal once a reversible error has been committed.

2. Whether the Seventh Circuit, as well as the Third, Fifth, and Eighth Circuits, have properly followed this Court's decision in *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738 (2005).

CERTIFICATE OF INTEREST

The Petitioner, **ROBERT D. PALADINO**, is represented in these proceedings by counsel, Thomas Anthony Durkin, Durkin & Roberts, 53 West Jackson Boulevard, Suite 615, Chicago, Illinois 60604, and Patrick W. Blegen, 53 West Jackson Boulevard, Suite 1362, Chicago, Illinois 60604.

Neither party has any other interest nor represents any other party or interest in these proceedings.

Thomas Anthony Durkin
Patrick W. Blegen

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Robert D. Paladino, respectfully prays that a writ of certiorari issue to review the judgement of the United States Court of Appeals for the Seventh Circuit entered in this case on February 25, 2005, and the final order denying his appeal entered on September 23, 2005.

OPINION BELOW

The opinion of the United States Court of Appeals affirming Paladino's conviction and ordering a limited sentencing remand appears at Appendix A to the Petition, and is reported at *United States v. Paladino*, 401 F.3d 471 (7th Cir.

2005). The United States Court of Appeals order affirming Paladino's sentence appears at Appendix B to the Petition.

JURISDICTION

The Seventh Circuit's opinion affirming Paladino's conviction, but maintaining jurisdiction and ordering a limited sentencing remanding was entered on February 25, 2005. (App. A) On September 23, 2005, the Seventh Circuit entered an order affirming Paladino's sentence, and denying a full sentencing remand. (App. B) The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution states in relevant part as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury.

Rule 106 of the Federal Rules of Evidence states as follows:

> When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

STATEMENT OF THE CASE

The crux of the government's case was that Paladino joined with his co-defendants in an effort to dupe investors out of millions of dollars by falsely offering up a prime bank / European trading program which promised two things: outrageously high returns on investments, and a risk-free investment in that the investors' money was to be held in escrow. (App. A, p. 3) Other individuals looking to borrow money rather than make investments were duped into paying advance fees for loans that were to be funded after the European investments came to fruition. (App. A, p. 3) The European trades never came to pass and virtually all of the investors lost their money. (App. A, p. 3)

The government's case against Paladino came down to knowledge; *i.e.*, did he know that investors were being defrauded. (App. A, p. 6) Prior to Paladino and his co-defendants having been indicted, the Securities and Exchange Commission (SEC) filed a lawsuit against each of the defendants as well as various companies such as Lennox Investment Group. (App. A, p. 6) During the course of the SEC's lawsuit, several of the defendants submitted to depositions, including Paladino. (App. A, p. 6-7)

At trial, the district court permitted the government, over Paladino's objection, to introduce selected excerpts of Paladino's SEC deposition testimony. (App. A, p. 6) As but two of many examples of the redactions at issue, one of the government's redactions simply cut Paladino's answer in half, quoting him as saying, "I learned that this money that's been coming in was investment money." Paladino's complete answer in the SEC transcript, however is, "I learned that this money that's been coming in was investment money, and I was totally surprised because I assumed this whole time that this

was trade money." (R. 331-10, p. 1728; App. A, p. 6-7) Another government redaction removed the date at which Paladino first saw a crucial document, omitting Paladino's testimony that he saw the document only after the scheme was over and the SEC had filed its suit. (App. A, p. 7)

The Seventh Circuit agreed with Paladino that the above described redactions, as well as others, were misleading and harmful, and violated Rule 106 of the Federal Rules of Evidence and the doctrine of completeness. (App. A, p. 7) Relying on this Court's decisions in *Luce v. United States*, 469 U.S. 38, 105 S.Ct. 460 (1984), and *Ohler v. United States*, 529 U.S. 753, 120 S.Ct. 1851 (2000), however, the Seventh Circuit concluded that because Paladino testified, and could have thereby cured the district court's error by simply reading the redacted portions of the deposition, he gave up his right to contest the error. (App. A, p. 7-8) According to the Seventh Circuit, Paladino should have refrained from testifying, awaited his conviction, and then won a retrial on appeal. (App. A, p. 8) Because he did not do so, Paladino was not entitled to a new trial based on the district court's error.

Paladino was sentenced to 72 months imprisonment under the federal sentencing guidelines. (App. A, p. 11) Based on *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738 (2005), the Seventh Circuit acknowledged that Paladino's sentence violated his Sixth Amendment right to trial by jury and conducted a plain error analysis. (App. A, p. 11-15) The Seventh Circuit refused the automatic remand approach adopted by the Sixth and Fourth Circuits, and instead adopted a variation of the plain error analysis employed by the Second Circuit in *United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005). (App. A, p. 20)

Thus, the Seventh Circuit chose not to order that